89- 1418 (1)

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ILLINOIS CORPORATE TRAVEL, INC.,
d/b/a McTravel Travel Services,

Petitioner,

v.

AMERICAN AIRLINES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the standard for the application of the "agency exception" to the rule against resale price maintenance is:

   (a) the "indicia of entrepreneurship" test established by this Court in *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964), and employed by the Fifth, Eighth, Ninth and Tenth Circuits; or

   (b) the "serves no purpose other than to circumvent the rule against price-fixing" test employed now by the Seventh Circuit.

2. Whether, despite *United States v. Masonite Corp.*, 316 U.S. 265 (1942), the "agency exception" to the rule against price-fixing may protect a price-fixing agreement among direct competitors.

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OPINIONS IN COURTS BELOW

Appeal of Denial of Motion for Preliminary Injunction, 806 F.2d 722 (7th Cir. 1986).

Grant of summary judgment on federal antitrust claims (Counts I-III). 700 F.Supp. 1485 (N.D.Ill. 1988).

Appeal of entry of summary judgment on federal antitrust claims. 889 F.2d 751 (7th Cir. 1989).

STATEMENT OF JURISDICTION

On November 13, 1989, the United States Court of Appeals for the Seventh Circuit issued its ruling and opinion in this case. The United States Supreme Court has jurisdiction to review the appellate court's decision by virtue of 28 U.S.C. §1254(1).

STATUTE INVOLVED

This case involves Section 1 of the Sherman Act, 26 Stat. 209, 15 U.S.C.A. §1, which, as amended, provides as follows:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

STATEMENT OF THE CASE

Airlines provide air transportation which is sold to the public in two ways: by travel agents and by the airlines themselves. Approximately seventy percent of tickets for flights on defendant, American Airlines, are sold by travel agents or by other airlines.[1] Virtually all domestic travel agents and virtually all domestic airlines are parties to a common contract, which is administered by a wholly-owned subsidiary of the airlines, the Airline Reporting Corporation, or "ARC." That master contract—the Airline Reporting Agreement ("ARC Agreement")—defines the contractual relationship between the airlines and travel agents. The ARC Agreement, *inter alia*, allocates to travel agencies nearly all of the risks associated with the sale of airline tickets by travel agencies, including credit risk. An individual airline may give notice of additional terms and conditions which it desires to be added to the ARC Agreement.

Most travel agencies sell airline tickets and other travel services at the full retail price (suggested by the provider of the service), and receive a commission from the travel supplier—airlines, hotels, rental car companies, and tour operators. The "standard" commission rate on domestic airline sales is ten percent. Although there is substantial price competition among the airlines, there is little or visible price competition among retail sellers in the travel services market.

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[1] Each airline acts like a travel agent, in that it can and regularly does sell tickets on virtually all airlines in the world, along with hotel, rental car, and other travel services.

Prior to January 1, 1985, airlines had a form of antitrust immunity and, consequently, engaged in government-sanctioned resale price maintenance. In January, 1985, with the immunity ended, McTravel[2] was formed to operate as a discount travel agent. It charged its customers the retail list price for airline tickets, then rebated to its customers the difference between its ten percent commission and a fee (originally $15) for making a reservation and issuing a ticket. To promote its service, McTravel advertised that it provided discounts selling tickets "on all airlines." It did not, and does not, advertise specific fares on specific airlines, including American.

Also in January, 1985, American circulated a "contract addendum" to the ARC Agreement which prohibited any travel agency from advertising a price for a ticket on an American flight other than the price fixed by American. It operated, and was understood by American, as a price restraint. McTravel became a party to the ARC Agreement and American's price-fixing addendum by March, 1985, but continued rebating commissions. In July, 1985, American terminated McTravel's right to sell tickets on American, and this lawsuit ensued.

McTravel filed suit under Section One of the Sherman Act. McTravel first moved for preliminary injunction, which was denied. The denial was affirmed by the Seventh Circuit in an opinion included in the Appendices to this Petition. American moved for summary judgment on all antitrust claims. The District Court granted that motion. McTravel again appealed, and the Seventh Circuit Court of Appeals affirmed the order granting summary judg-

[2] Petitioner Illinois Corporate Travel, Inc. d/b/a McTravel Travel Services ("McTravel") is a wholly-owned subsidiary of Utilities, Inc.

ment. It is that order from which McTravel now petitions this Court.

The District Court had jurisdiction over the case pursuant to 28 U.S.C. §1331, there being a federal question in Counts I-III, under 15 U.S.C. §1.

REASONS FOR ALLOWANCE OF THE WRIT

I.

THE 7th CIRCUIT'S AGENCY STANDARD IS INCONSISTENT WITH THIS COURT'S DECISION IN *SIMPSON* AND WITH THE 5th, 8th, 9th AND 10th CIRCUITS.

In *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964), the Court created a standard for the application of the "agency exception." It held that "independent businessmen" who "have all or most of the indicia of entrepreneurs" are not within the agency exception, and the price at which they sell cannot be fixed by others. That test has been employed by every court of appeals to consider the matter, except the Seventh Circuit. *Hardwick v. Nu-Way Oil Co.*, 589 F.2d 806, 809 (5th Cir. 1979), *cert. denied*, 444 U.S. 836 (1979); *Greene v. General Foods Corp.*, 517 F.2d 635, 652 (5th Cir. 1975); *Ryko Mfg. Co. v. Eden Services*, 823 F.2d 1215 (8th Cir. 1987), *cert. denied*, ___ U.S. ___, 108 S.Ct. 751 (1988); *Mesirow v. Pepperidge Farm, Inc.*, 703 F.2d 339 (9th Cir. 1983), *cert. denied*, 464 U.S. 820 (1983); *American Oil Co. v. McMullin*, 508 F.2d 1345 (10th Cir. 1975).

In contrast, the Seventh Circuit stands alone in rejecting the "indicia of entrepreneurship" test, in favor of a test which is so fluid and without content as to allow the

exception to swallow the rule. In the Seventh Circuit an agency or consignment device can protect vertical price-fixing unless the agency "serves no function other than to circumvent the rule against price fixing." *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 889 F.2d 751 (7th Cir. 1989) (the decision under review); *Kowalski v. Chicago Tribune Co.*, 854 F.2d 168 (7th Cir. 1988); *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 806 F.2d 722 (7th Cir. 1986); *Morrison v. Murray Biscuit Co.*, 797 F.2d 1430 (7th Cir. 1986).

There is a reason for this. The authors of the Seventh Circuit opinions on this topic do not believe that vertical price-fixing should be illegal *per se*; indeed, they believe that vertical price-fixing should be legal *per se*.[3] See, Easterbrook, F., "Vertical Arrangements and the Rule of Reason," 53 *Antitrust Law Journal* 135 (1984); Posner, R. "The Next Step in the Antitrust Treatment of Restricted Distribution: *Per Se* Legality" 48 *U.Chi.L.Rev.* 6 (1981). That may be the wish of the Seventh Circuit, but it is not the law of this Court. *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988); *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984).

Perhaps in an effort to expand (even if beyond its logical limit) an exception to a rule the Seventh Circuit does not like, it has defined the agency exception in a way which is both (a) inconsistent with the standard employed by

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[3] In the opinion below, Judge Easterbrook noted that this price-fixing agreement "has no effects different from those of vertical restraints that courts routinely sustain," speaking of non-price restraints. 889 F.2d at 753. Thus, Judge Easterbrook implied that price-fixing and territorial restraints ought not to be treated differently. But price restraints are treated differently—they are *per se* unlawful. *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 108 S.Ct. 1515, 1519 (1988).

every other circuit to have addressed the issue, and (b) without meaningful content.

Nowhere in its four decisions on the subject does the Seventh Circuit ever explain what ostensible "agency" could be such a sham as to "serve no function other that to circumvent the rule against price fixing." Indeed, by its terms, this standard provides a safe harbor to those who wish to fix the prices at which others (even their competitors) may sell, so long as it serves some other function as well. One need only designate the relationship with a reseller an "agency" and allow that relationship to serve some business function, no matter how minor. Then, according to the Seventh Circuit, resale prices may be fixed. Were that the rule, any well-counselled seller could circumvent the rule against vertical price-fixing, which is the result the Seventh Circuit apparently desires.

Consequently, this Court should issue a writ of *certiorari* to review the Court below to guide the courts of appeals in judging the scope of the agency exception.

II.

THE SEVENTH CIRCUIT'S DECISION IS IN DIRECT CONFLICT WITH *UNITED STATES v. MASONITE CORPORATION.*

The District Court found sufficient evidence that American competes with travel agents. 700 F.Supp. at 1492-93. It also found sufficient evidence of a horizontal price-fixing agreement. 700 F.Supp. at 1490.[4] The District Court, how-

[4] The District Court questioned, however, whether McTravel was ever a party to that agreement, because it did not act in accordance with it. 700 F.Supp. at 1489. McTravel demonstrated on appeal that any travel agency authorized by ARC automatically became a party to the ARC Agreement and its price-fixing addendum. This result was not addressed by the Seventh Circuit.

ever, found that McTravel was, for antitrust purposes, American's agent. Therefore, the District Court held that the "agency exception" to the law against price-fixing first described in *United States v. General Electric Corp.*, 272 U.S. 476 (1926), made American's agreement with McTravel legal. *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 700 F.Supp. 1485, 1492-93 (N.D.Ill. 1988).

This Court has held that the agency exception *does not* protect price fixing by a principal which competes with its agents. *United States v. Masonite Corp.*, 316 U.S. 265 (1942). *See, Sun Oil Co. v. Federal Trade Comm'n*, 350 F.2d 624 (7th Cir. 1965), *cert. denied*, 382 U.S. 982 (1966). Until the instant case, no court has ever questioned that rule of law.

Sun Oil and *Masonite* are directly on point here. In *Sun Oil*, as here, the defendant was charged with both vertical and horizontal price fixing. The defendant, like American here, responded by relying on the agency exception. There, the Seventh Circuit expressly rejected the argument with which American has carried the day in this case. In *Sun Oil*, the Court relied on *Masonite* and held that the agency exception provided the defendant no protection, because of the evidence of competition. Curiously, the Seventh Circuit's opinion in this case made no mention of *Sun Oil*; it rejected the holding of *Sun Oil* without citation or explanation.

The Seventh Circuit did not follow the District Court's explanation of the fate of *Masonite*, and expressly conceded that *Masonite* could be read as McTravel suggests. 889 F.2d at 753. Instead of doing so, however, the Seventh Circuit attempted to limit *Masonite* in a way which has no basis in antitrust law. More importantly, the Seventh Circuit's rationale, if followed, would eviscerate the rule against horizontal price-fixing.

Masonite involved an agency agreement among competitors who competed not only in the sale, but also in the manufacture of "hardboard". Under that agreement, the competitors sold Masonite's "hardboard" at prices set by Masonite. The Seventh Circuit held that this agreement was "horizontal in an economically meaningful way" only because:

> Producers to which consumers might turn for supply suddenly withdrew from the market. With supply down price had to rise, producing a monopoly overcharge.

889 F.2d at 753.

Thus, according to the Seventh Circuit, a price fixing agreement among competitors is not "horizontal in an economically meaningful way" unless the restraint on competition restrained not only sales, but also supply. The Court then made a finding which was never suggested by the parties and which has no record support: that "[a]n agreement between American and its travel agents does not reduce supply from consumers' perspective; only an agreement among air carriers could do that."

If this novel argument were correct, the rule against horizontal price fixing would apply only to price fixing among manufacturers. This is inconsistent with years of existing jurisprudence. The Sherman Act prohibits price-fixing among non-manufacturing sellers just as it prohibits price-fixing among manufacturers. See, *e.g.*, *United States v. McKesson and Robbins, Inc.*, 351 U.S. 305 (1956). The only reason for this unfounded explanation of the holding in *Masonite* is to create a foundation for that Court's efforts to eliminate the *per se* rule against price-fixing.

Moreover, the Seventh Circuit's economics in this case are suspect. Agreements among retail sellers may reduce

output by raising prices, because reduced demand will result from the higher prices. Therefore, American's agreement with its competitors is likely to have the effect of reducing supply.

This Court should issue a writ in this case in order to reaffirm that a price fixing agreement among competitors—any competitors—is illegal. This must be true for all competing sellers of products or services, regardless of whether any of those competitors is also a supplier.[5]

Here, American has effected an industry-wide express price-fixing agreement with travel agents that compete directly with it on the sale of tickets for travel on American. Such an agreement serves only to create higher prices for consumers, with no countervailing benefit. Such an agreement is properly condemned under *Masonite*.

[5] This does not mean that every dual distributor that sets prices for its sales agents must be condemned, because not every dual distributor actually competes with its sales agents. Often dual distributors do not compete with their distributors or agents, as was the case in *United States v. General Electric Corp.*, 272 U.S. 476, 481 (1926). Here there was evidence of more—of direct competition.

CONCLUSION

The Seventh Circuit's decision below is inconsistent with two opinions of this Court and with every court of appeals to have addressed the issues raised by this case. The Seventh Circuit's error is no accident; it is part of its continuing effort to erode—or to eliminate—the *per se* rule against price-fixing. This Court should grant a writ of *certiorari* to resolve the conflict the Seventh Circuit has established between its antitrust theories and this Court's established antitrust principles.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 89-1230

ILLINOIS CORPORATE TRAVEL, INC., doing business as McTravel Travel Services,

Plaintiff-Appellant,

v.

AMERICAN AIRLINES, INC., and IVI TRAVEL, INC.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 85 C 7079—**Brian Barnett Duff,** *Judge.*

ARGUED SEPTEMBER 21, 1989—DECIDED NOVEMBER 13, 1989

Before WOOD, JR., EASTERBROOK, and RIPPLE, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* American Airlines would like to ban discounting by the firms that sell its tickets, but a prohibition cannot be enforced. Under-the-table discounts, rebates by "captives" (travel subsidiaries of the firms whose employees are traveling), and tie-in sales (packages of air travel and other services such as hotels, with the price reduction on the air fare allocated for bookkeeping purposes to the hotel or car rental) are endemic. American decided to demand only what it was prepared

to enforce: it issued an Addendum to the agreement all travel service operators must sign forbidding those selling its tickets to *advertise* that they offer discounts. A division of Illinois Corporate Travel, Inc., operating under the name McTravel Travel Services, advertised discounts on American; American denied it access to the plate used to issue its tickets and informed other air carriers that it would not accept tickets McTravel wrote using other carriers' plates.

McTravel sued under the Sherman Act, 15 U.S.C. §1, and in 1986 we affirmed a decision declining to issue a preliminary injunction against American's rule. 806 F.2d 722 (7th Cir. 1986). After discovery, the district court dismissed some counts of the complaint and then granted summary judgment for American. 682 F. Supp. 378, 700 F. Supp. 1485 (N.D. Ill. 1988). Because our earlier opinion and the district court's two subsequent opinions rehearse the facts, we deal briefly with McTravel's contentions.

We concluded in 1986 that although a ban on price advertising is a form of resale price maintenance, the per se rule against this practice does not apply when the vendor is a genuine agent. See also *Morrison v. Murray Biscuit Co.*, 797 F.2d 1430 (7th Cir. 1986); *Kowalski v. Chicago Tribune Co.*, 854 F.2d 168 (7th Cir. 1988). McTravel asks us to reexamine this conclusion, observing that air travel may be decomposed into two products: the transportation, which American sells, and the reservation and ticketing service, which McTravel sells. American sets the net price it receives, without complaint from McTravel, which seeks only to advertise that it charges for its service a flat fee that usually is less than the 10% standard in the industry. Any agent—indeed any employee—could make the same distinction, however, and if it prevailed the agency exception to the rule against resale price maintenance would be defunct. Producers of goods and services may have solid reasons for putting their agents on commission rather than a fixed markup. Commissions align the agents' interests with those of the principal; they do well or poorly together, which induces the agents to work harder in the prin-

cipals' interests. If the travel business is a genuine agency relation, then the principal is no less entitled to decide between commission and piecework rates than it is entitled to decide the net price for its product.

When the case was here in 1986, we thought it tolerably clear that travel service operators are the air carriers' agents. They carry no inventory and can book space only by requesting it from the carrier's computer; air carriers set the price for each ticket (sometimes changing the allocation of seats among price and travel-date-restriction categories by the hour), produce the service, deliver it direct to travelers, and take the risk of unsold seats. Although each travel service operator (conventionally called a "travel agent", a telling phrase) works with many airlines, hotel chains, and other suppliers of travel services, this is a common form of organization. Real estate agents work for many clients, and multiple-listing services allow many agents access to the same properties; auction houses sell works of art furnished by hundreds of owners at a single sitting.

McTravel insists that development of the record since 1986 has produced disputes about questions of material fact, but the only fact to which McTravel points is not disputed: airlines and banks bear the flyers' credit risks, *unless* the travel service operator takes a check or gives credit without complying with the requirements of the credit card's issuer. McTravel observes that whenever it issues a ticket on the basis of a credit card number received by phone it must take the risk, because the credit card issuers will accept the risk only when the vendor obtains an imprint and signature. No one disputes this, but although an agent may decide to take more risk than it has to, a unilateral decision does not change the nature of the agency. Many a clerk at Sears has found that loss from unauthorized credit (or failure of the cash drawer to tally with the tape) comes out of his own pocket; this does not make the relation less one of employment. So too with travel service operators, especially when the risk has scarcely been realized. McTravel has identified only

three reversed charges in its history. Travel service operators are "agents" for purposes of antitrust law when they sell tickets for air carriers' accounts. Bulk sales—outright purchases by the travel agents and resales to flyers—are a different matter. American does not object to advertising discounts on such tickets, on which the travel agents are standard retailers.

American has its own reservation and ticketing service, which not only sells air travel but also makes hotel and rental car reservations in competition with its agents. Dual distribution makes an agreement "horizontal", according to McTravel, which brands it as illegal per se under the holding of *United States v. Masonite Corp.*, 316 U.S. 265 (1942). *Masonite* could be read this broadly, could even be read as eliminating the difference between agents and independent distributors, but we do not understand it so. Several makers of particle board reached an agreement under which all but Masonite retired from the business; those who quit became Masonite's "del credere agents" and sold its product at fixed prices. This was horizontal in an economically meaningful way. Producers to which consumers might turn for supply suddenly withdrew from the market. With supply down price had to rise, producing a monopoly overcharge. Although the (former) rivals contended that they were just knuckling under to the force of Masonite's patents, the Supreme Court saw a more sinister arrangement—properly so unless the patent was both broad and iron-clad, which could not be known once the former rivals started cooperating. An agreement between American and its travel agents does not reduce supply from consumers' perspective; only an agreement among the air carriers could do that.

Reduced competition among travel agents to sell American's tickets has no effects different from those of vertical restraints that courts routinely sustain. Assigning discrete territories to resellers is governed by the Rule of Reason, *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), and so is reserving particular customers for the manufacturer, to the exclusion of the dealers,

White Motor Co. v. United States, 372 U.S. 253 (1963). The manufacturer that reserves customers, as in *White Motor*, is as much a rival of its dealers as is the manufacturer that allows competition among dealers for all customers and joins the fray itself—and the reservation of customers is the more effective restriction on distribution, as customers see things, because it leaves each customer with only one potential seller. Dual distribution therefore does not subject to the per se ban a practice that would be lawful if the manufacturer were not selling direct to customers; antitrust laws encourage rather than forbid this extra competition.

Because travel service operators are the air carriers' agents, the requirement to refrain from advertising a lower price is lawful per se, just as the obligation is lawful when fastened on one's employees. To say that regulating price advertising (like setting the price) is lawful is not necessarily to say that the whole practice is lawful. Perhaps a given arrangement does more than set the agents' price. Our 1986 opinion left open the possibility that McTravel could establish a violation of the antitrust laws under the Rule of Reason. On the first appeal McTravel argued that because any travel agent must be able to furnish tickets from all major air carriers if it is to survive, American's requirement could set the standard for the industry, as effective as any horizontal arrangement among suppliers with substantial market power. Proof has not been forthcoming. So far as the record reveals, many travel agents, including McTravel itself, continue to be discounters on all flights and aggressive advertisers of this for carriers other than American. Nothing in American's Addendum forbids a travel agent to advertise that it gives discounts on other carriers' flights. Nothing in the record suggests that other carriers have followed American's practice or that travel agents have been dissuaded from discounting the flights of American's rivals. Summary judgment on the antitrust questions therefore was appropriate.

The district court dismissed on the pleadings three claims under Illinois law, one based on the state's Consumer

Fraud and Deceptive Business Practices Act, Ill. Rev. Stat. ch. 121½ ¶¶ 261-62, the others on common law rules such as the prohibition against tortious interference with prospective contractual advantage. One of the claims the court dismissed without prejudice, relinquishing its pendent jurisdiction. The other two are preempted, the court held, by 49 U.S.C. App. §1305(a)(1), which provides:

> [N]o State or political subdivision thereof . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under Title IV of this chapter to provide air transportation.

McTravel does not dispute the propriety of resolving questions of preemption under the pendent jurisdiction. See *Graf v. Elgin, Joliet & Eastern Ry.*, 790 F.2d 1341, 1345-48 (7th Cir. 1986); cf. *LaBuhn v. Bulkmatic Transport Co.*, 865 F.2d 119 (7th Cir. 1988). Neither does it dispute the holding of *Anderson v. US Air, Inc.*, 818 F.2d 49 (D.C. Cir. 1987), that "law, rule, regulation, standard, or other provision" includes common as well as statutory law. It argues instead that state regulation or prohibition of contracts between air carrier and agent forbidding price advertising does not "relat[e] to rates" within the meaning of §1305(a)(1). Yet McTravel's antitrust claim depended on the proposition that to forbid the advertising of discounts *is* to set price (at least to influence it), a proposition with substantial support in both law, *United States v. Gasoline Retailers Ass'n*, 285 F.2d 688 (7th Cir. 1961), and economics. Cf. *Bates v. State Bar of Arizona*, 433 U.S. 350, 377-78 (1977).

Price advertising surely "relates to" price; the "relating to" language in §1305(a)(1) substantially increases the extent of preemption. *Hingson v. Pacific Southwest Airlines*, 743 F.2d 1408, 1415 (9th Cir. 1984). (The same "relating to" language in ERISA has led to a startlingly broad preemption of state laws. E.g., *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983).) Although 49 U.S.C. App. §1506 preserves state common law from implicit preemption, see

Bieneman v. City of Chicago, 864 F.2d 463, 470-73 (7th Cir. 1988), the preemption here is express rather than implied. If the state law relates to "rates, routes, or services", the absence of contrary federal law is irrelevant.

McTravel's submission that to advertise a rebate of its commission is not to advertise a lower price for air travel is a reprise of its argument that air travel and ticket dispensing are distinct services with separate prices; we rejected this when dealing with the antitrust claim, and it is no more compelling now. Both American and McTravel sell tickets nationwide. Section 1305(a)(1) ensures that the prices at which these sales occur to consumers, and the accompanying advertising, can proceed under a legal standard uniform nationwide. We need not consider the extent to which state laws may control deceptive advertising, require disclosures, or enforce (as opposed to upset) contracts between carriers and agents; it is enough to say that no state may require an air carrier to deal with a would-be agent who refuses to respect a contract restricting advertising of discount prices.

AFFIRMED

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ILLINOIS CORPORATE TRAVEL, INC., d/b/a McTravel Travel Services,	)	
Plaintiff,	)	
v.	)	No. 85 C 7079
AMERICAN AIRLINES, INC., IVI TRAVEL INC., and TRAVEL RITE, INC.,	)	
Defendants.	)	

MEMORANDUM OPINION

American Airlines gives its passengers "something special in the air." McTravel Travel Services wants to give them something special on their fares. American will let travel agencies discount tickets on American flights, so long as they do not advertise these discounts. McTravel thinks this policy violates § 1 of the Sherman Act, 15 U.S.C. § 1, as well as Illinois statutory and common law, and has thus sued American and another travel agency, IVI Travel, Inc. McTravel wants an injunction requiring American to allow McTravel to advertise discounted tickets

on American flights, and monetary damages resulting from American's refusal to do so.

American won the first battle when Judge Getzendanner denied McTravel's motion for a preliminary injunction, *Illinois Corporate Travel, Inc.* v. *American Airlines, Inc.*, 85 C 7079, slip op. (N.D. Ill. September 15, 1985), *aff'd*, 806 F.2d 722 (7th Cir. 1986) (Easterbrook, J.), and the second when this court ruled that the Federal Aviation Act, 49 U.S.C. § 1305(a)(1), preempts McTravel's state law claims, *Illinois Corporate Travel, Inc.* v. *American Airlines, Inc.*, 682 F. Supp. 378 (N.D. Ill. 1988). American and IVI now seek to end the war, moving for summary judgment on the Sherman Act claims. For the reasons set forth below, their motions will be granted.

BACKGROUND

With the single exception discussed below, the underlying facts in this case are not in dispute.[1] American sells tickets on its flights in two ways. Thirty percent are sold by American directly. Seventy percent are sold by authorized independent travel agencies. These travel agencies sell tickets for many airlines, and engage in a number of additional services: They provide their clients with information and advice, make reservations, write and deliver tickets, notify customers of schedule changes, issue boarding passes and sell travel-related insurance.

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[1] In their memorandum for summary judgment, defendants rely extensively on Judge Getzendanner's factual findings in denying the preliminary injunction. That was wrong, and if the defendants' lawyers would like to know why, they should revisit their notes from first year of law school. *See also University of Texas* v. *Canenisch*, 451 U.S. 390-95 (1981) ("[F]indings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits.").

In order to sell a ticket on an American flight, a travel agency must be accredited by the Airline Reporting Corporation ("the ARC"). Once accredited, an agency can apply to American for authorization, in which case it must agree to the standard ARC Travel Agency Agreement ("the ARC Agreement") and American's addendum to it. An agency will also be able to sell tickets on American flights if it is an authorized agent for an airline with which American has entered into a Bilateral Interline Agreement ("A BIA Agreement"), unless American specifically notifies the other airline that its authorized travel agencies may not issue American tickets.

Pursuant to the ARC Agreement, a travel agency must check for availability with American before issuing a ticket. Once it does so, American bears any risk for the failure to abide by the terms of the ticket. The only risks travel agencies assume in selling tickets arise out of their own misconduct: Because credit card companies prohibit accepting credit card orders over the telephone, travel agencies selling tickets in this fashion assume the credit risk of these sales; in addition, if a travel agency fails to take "reasonable care" to protect tickets in their possession, it bears the risk of theft.

From 1981 through 1984, American's addendum to the ARC Agreement required travel agencies ticketing American flights to charge the same as American does. American would then pay the agencies a 10% commission on each sale. This contract expired on December 31, 1984.

On January 1, 1985, deregulation in the airline industry entered a new era as the Civil Aeronautics Board was disbanded and many airlines revoked their earlier policies forbidding travel agencies to sell discounted tickets. That month, Illinois Corporate Travel ("ICT"), an ARC ac-

credited, and American authorized, travel agency opened a branch office under the name McTravel. McTravel was created as a discount travel agency. Rather than charge a traveller the full amount of an airline ticket, it would charge a set fee over the amount it had to pay the airline for the ticket—i.e., 90% of the full price established by the airline—and rebate the remainder of its 10% commission to the traveler. Because McTravel did not at first have its own ARC accreditation, it used ICT to issue airline tickets.

On January 18, the Vice President of IVI called American's zone sales manager for Northern Illinois, Richard Gard, to inform him that McTravel was advertising discounts on airline tickets. He asked, "You aren't going to let these guys do this, are you?"

Later that day, Mr. Gard contacted American sales representative Susan Wellinghoff, who went to McTravel and advised McTravel President Richard Dickieson that discounting American tickets was forbidden. After a brief discussion, Ms. Wellinghoff told Mr. Dickieson that she would speak to Mr. Gard and get back to him.

On January 22, Ms. Wellinghoff and Mr. Dickieson met again. Ms. Wellinghoff explained that American had received complaints from IVI, one of the largest travel agencies in the Chicago area, regarding McTravel's advertising. She also clarified that American was no longer enforcing its earlier policy of prohibiting discounted fares, but that American would not permit advertising of these discounts. She told Mr. Dickieson that if McTravel persisted in its advertising, American would revoke McTravel's authority to issue American tickets. After this meeting, Mr. Dickieson's efforts to discuss the matter further with American were rebuffed.

In March, McTravel received ARC accreditation, but American has refused to authorize McTravel to sell American tickets, and has notified other airlines that it will no longer honor tickets issued by their authorized travel agencies. Accordingly, McTravel is operating today without the ability to sell tickets on American flights.

The only disputed factual issue lies in American's motivation for prohibiting McTravel from advertising discounts. American maintains that the policy against advertising discounts arose out of a meeting in late 1984 at which it was determined that the policy against advertising discounts was impossible to enforce but that a policy prohibiting advertising would be both effective and enforceable. American points to a letter dated January 3, 1985, which explained that American's addendum to the new ARC Agreement prohibits advertising discounted fares, as establishing that the policy was put into place prior to the complaint from IVI. American concedes that its protest to McTravel's advertising was made in response to the call from IVI, but insists that the decision to deny McTravel the authority to issue American tickets was an independent one.

McTravel contends that both the decision and the policy were direct responses to complaints from IVI and other large travel agencies regarding McTravel's advertisements. It notes that, notwithstanding the date on the letter accompanying the new ARC Agreement and addendum, there is no evidence that any travel agency actually received the letter prior to February, 1985. It also points out that IVI and American had an express agreement relating to advertised discounts and that American took action against McTravel only after IVI complained about McTravel's advertising. McTravel argues that these facts create a genuine issue of fact as to whether American's

no-advertising policy arose independently or, instead, resulted from the objections of McTravel's large competitors.

DISCUSSION

Section 1 of the Sherman Act proscribes any "contract, combination . . . or conspiracy in restraint of trade." 15 U.S.C. § 1. The Supreme Court has long held that, notwithstanding its unqualified language, § 1 "was intended to prohibit only unreasonable restraints of trade." *Business Electronic Corp.* v. *Sharp Electronics Corp.*, 108 S.Ct. 1515, 1519 (1988). In most cases, "whether particular concerted action violated § 1 of the Sherman Act is determined through case-by-case application of the so-called rule of reason—that is, 'the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.' " *Id.* (quoting *Continental, T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1977)).

At the same time, however, the Supreme Court has determined that certain categories of agreements are so "manifestly anticompetitive"—"always or almost always tend[ing] to restrict competition and decrease output," *Northwest Wholesale Stationers, Inc.* v. *Pacific Stationery & Printing Co.*, 472 U.S. 284, 289-90 (1985)—that they are *per se* illegal. *Continental, T.V., Inc.* v. *GET Sylvania, Inc.*, 433 U.S. at 50. Once a plaintiff establishes that it has been injured by such an agreement, the plaintiff need prove nothing more in order to recover for its injury. *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 692 (1978). Both concerted refusals to deal sparked by competitors of the refused, *Klor's Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959), and concerted agreements on resale prices (or the advertisement

of resale prices), *United States* v. *Parke, Davis & Co.*, 362 U.S. 29 (1960); *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373 (1911), constitute *per se* violations of § 1.

McTravel presents three separate theories to support its allegations that American's refusal to allow it to issue American tickets violates § 1 of the Sherman Act. Count I claims that American's response to IVI's complaint constitutes a conspiratorial refusal to deal. Count II claims that American's actions in furtherance of the no-advertising agreement with other travel agencies represent concerted resale price maintenance. Count III claims that American's insistence that McTravel abide by the no-advertising policy is itself resale price maintenance in violation of § 1. Since all three claims allege conduct subject to the *per se* rule, McTravel argues that not only is summary judgment for defendants inappropriate, but that McTravel is entitled to judgment under each of its claims.

American does not deny at this juncture that the refusal to deal with McTravel, and the policy against advertising discounts, constitute unreasonable restraints of trade. Instead, it focuses on the § 1 requirement that, to be unlawful, such restraints involve concerted action. As Justice Rhenquist has explained.

> [T]here is the basic distinction between concerted and independent action—a distinction not always clearly drawn by parties and courts. Section 1 of the Sherman Act requires that there be a "contract, combination . . . or conspiracy" between the manufacturer and other distributors in order to establish a violation. 15 U.S.C. § 1. Independent action is not proscribed. A manufacturer of course generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently.

Monsanto Co. v. *SprayRite Services Corp.*, 465 U.S. 752, 760-61 (1974). "Because the Sherman Act does not prohibit unreasonable restraints of trade as such—but only restraints effected by a contract, combination or conspiracy—it leaves untouched a single firm's anti-competitive conduct (short of threatened monopolization) that may be indistinguishable from the conduct of two firms subject to § 1 liability." *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752 (1984); *see also United States* v. *Parke, Davis & Co.*, 362 U.S. 29 (1960); *United States* v. *Colgate*, 250 U.S. 300, 307 (1919).[2]

Taking the counts in reverse order, McTravel bases its resale price maintenance claim in Count III on American's relationship with McTravel alone. Although the Supreme Court has stated that a plaintiff can charge concerted action between himself and the supplier "as of the day he unwillingly complied with the restrictive franchise agreements," *Perma Life Mufflers* v. *International Parts Corp.*, 392 U.S. 134 (1968), American points out, and

[2] McTravel seems to believe that even if it loses its arguments for *per se* illegality, it is still entitled to a trial under the rule of reason—perhaps because Judge Easterbrook undertook rule of reason analysis in one part of the *Illinois Corporate Travel* opinion. Yet, the *per se* rule of reasons dichotomy depends entirely on the type of concerted activity at issue: price restraints are *per se* illegal; non-price restraints are subject to the rule of reason. Judge Easterbrook's inquiry under the rule of reason apparently reflects his hope that the Supreme Court will do away with the *per se* rule entirely, and subject all concerted restraints of trade to rule of reason analysis. *See Illinois Corporate Travel, Inc.* v. *American Airlines, Inc.*, 806 F.2d at 730-31 (Flaum, J., concurring in the judgment). But it in no way negates McTravel's burden to establish a concerted restraint of trade in the first place—the critical issue in the defendants' motions for summary judgment on all three claims. (In *Business Electronic Corp.* v. *Sharp Electronics Corp.*, 108 S.Ct. 1515, 1519 (1988), the Supreme Court reiterated that price fixing agreements remain illegal *per se* under § 1).

McTravel concedes, that McTravel never agreed to American's no-advertising demands. Accordingly, McTravel cannot establish concerted action between it and American, *Santa Clara Valley Distributing* v. *Pabst Brewery*, 556 F.2d 942, 945 & n.3 (9th Cir. 1977),[3] and American is entitled to summary judgment on this count.

The other two counts are predicated on the relationship between American and IVI, and as such require a more extensive analysis. Count II focuses on the ARC Agreement and American's addendum prohibiting the advertising of discounts. To avoid summary judgment, McTravel must establish a genuine issue of fact as to whether American and IVI entered into an illegal agreement "that caused [McTravel] to suffer a cognizable injury." *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 106 S.Ct. 1348, 1356 (1986).

An agreement between a supplier and one of its distributors regarding prices is generally *per se* unlawful under § 1. Moreover, a causal connection between such an agreement and the termination of a non-agreeing distributor can usually be inferred because "[the agreement] may be necessary to maintain [the] agreement[ ] with [the] complying dealer[ ]," VII Areeda, *Antitrust Law*, ¶ 1446 at 1459; *see Monsanto Co.* v. *SprayRite Services Corp.*, 465 U.S.

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[3] Although courts and commentators have observed that "it makes no sense to deny recovery to a pressured retailer who resists temptation to the last and grant it to one who momentarily yields but is restored to virtue by the vision of treble damages," *Albrecht* v. *Herald Co.*, 390 U.S. 145, 162 (1968) (Harlan, J., dissenting); *Sahm* v. *V-1 Oil Co.*, 402 F.2d 69, 71 (10th Cir. 1968); VII Areeda, *Antitrust Law*, ¶ 1452 at 132 (1986), "it is clear that if the plaintiff . . . concedes that alleged pricing pressures never interfered with his resale pricing decisions, coerced acquiescence, and hence unlawful agreement, is not established." 2 Van Kalinowski, *Antitrust Laws and Trade Regulation*, § 6B.02[2] at 6B-25 (1988).

at 767-68. In light of American's concession that it has an agreement with IVI on the advertising of discounts,[4] and the uncontested fact that American moved against McTravel almost immediately after receiving the complaint from IVI, McTravel argues that there is, at least, a jury question as to whether it is a victim of an illegal resale price maintenance agreement.

McTravel would be right,[5] were it not for a special limited exception to the prohibition against resale price agreements between suppliers and resellers. In *United States* v. *General Electric Co.*, 272 U.S. 476 (1926), the Supreme Court held that § 1 does not apply to price restrictions imposed by suppliers on their agents. "The

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[4] IVI apparently does not concur in American's concession that the two had an agreement on advertising, arguing that although the policy was included in American's addendum to the 1985 ARC Agreement, IVI never actually agreed to the policy. Nevertheless, in light of American's concession, and the fact that travel agencies *must* accept the terms of any American addendums in order to remain authorized agents of American, there exists, at least, a genuine issue of fact regarding whether an agreement on advertising existed.

[5] The defendants' argument that *Monsanto Co.* v. *SprayRite Services Corp.*, 465 U.S. 752, 760-61 (1984), precludes finding the requisite causal connection between IVI's complaint and American's action against McTravel demonstrates their misunderstanding of the *Monsanto* ruling. In that case, the Supreme Court ruled that complaints from the plaintiff's competitors, followed by action on the part of the manufacturer, were insufficient to establish the existence of an agreement between the competitors and the manufacturer. *Id.* at 763. The Court did not say that, once such an agreement is shown, a complaint is insufficient to establish that the manufacturer's subsequent action against the plaintiff resulted from the agreement. On the contrary, the existence of an agreement followed by a complaint will always, or almost always, be enough to allow a jury to find the requisite causal connection between the agreement and the manufacturer's subsequent action. *See* VII Areeda, *Antitrust Law*, ¶ 1446 at 1459.

owner of an article . . . is not violating the common law, or the Anti-Trust law, by seeking to dispose of his article directly to the consumer and fixing the price by which its agents transfer the title directly from him to the consumer." *Id.* at 488.

In ruling on McTravel's motion for a preliminary injunction, Judge Getzendanner noted that this exception was called into question by *Simpson* v. *Union Oil Co.*, 377 U.S. 13 (1964). *Simpson* held that consignment arrangements between an oil company and its distributors did not protect them from liability for price-fixing under § 1. *Illinois Corporate Travel, Inc.* v. *American Airlines, Inc.*, 85 C 7079, slip op. at 8. Nevertheless, the district court interpreted *Simpson* as standing only for the proposition that where a traditional supplier-reseller relationship exists—where the "consignees bear the risk of the distribution process" and act as "independent businessmen"—§ 1 liability cannot be avoided by the use of consignment arrangements which leave technical ownership of the products in the supplier until the date of resale. *Id.* at 8-9 (citing *Hardwick* v. *Nu-Way Oil Co., Inc.*, 589 F.2d 806 (5th Cir.), *cert. denied*, 144 U.S. 836 (1979); *Fuchs Sugars & Syrups, Inc.* v. *Amstar*, 602 F.2d 1025 (2d Cir.), *cert. denied*, 444 U.S. 917 (1979)). Judge Getzendanner then proceeded to find that travel agencies are "true agents" of the airlines:

> A travel agent does not assume the significant risks and duties that resellers in a vast distribution scheme assume. The travel agent has no risk of unsold inventory, no credit risk, no authority to set prices, and no freedom to sell the product without checking with the airline for availability. The product is delivered directly from the airline to the customer, and the travel agent never takes "title" to the airline seat or assumes the risk that a particular seat may go unsold.

Id. at 11. Accordingly, the district court concluded that McTravel could not prevail on the resale price maintenance claim predicated on the no-advertising agreement.

In affirming this ruling, the Seventh Circuit noted that, after Judge Getzendanner had ruled, it had "concluded in *Morrison* v. *Murray Biscuit Co.*, 797 F.2d 1430 (7th Cir. 1986), that *General Electric* is still healthy." *Illinois Corporate Travel, Inc.* v. *American Airlines, Inc.*, 806 F.2d at 724; *accord Ryko Mfg. Co.* v. *Eden Services*, 823 F.2d 1215 (8th Cir. 1987), *cert. denied*, 108 S.Ct. 751 (1988); *see also Business Electronic Corp.* v. *Sharp Electronics Corp.*, 108 S.Ct. at 1524 (§ 1 "does not apply to restrictions on price to be charged by one who is in reality an agent of, not a buyer from, the manufacturer."). "The appropriate inquiry is 'whether the agency relationship has a function other than to circumvent the rule against price fixing,' " *Illinois Corporate Travel, Inc.* v. *American Airlines, Inc.*, 806 F.2d at 725 (quoting *Morrison* v. *Murray Biscuit Co.*, 797 F.2d at 1436)—whether, "objectively viewed, the arrangement serves one of the economic functions of agencies in general, such as apportioning risk, or lodging pricing decisions in the firm best able to gauge market conditions." *Id.* at 726.

The Seventh Circuit agreed with Judge Getzendanner that this analysis "supports the . . . conclusion that McTravel is an agent of airlines and not a reseller." *Id.* McTravel, for its part, clings to the parenthetical at the end of this discussion:

> Of course, conclusions that depend on the record compiled so far might be altered if additional facts adduced at trial show that the district court has mischaracterized the nature of the relationship between airlines and travel service operators. Here and elsewhere, we speak only of the conclusion drawn on the basis of the existing record.

Id. McTravel insists that its additional evidence showing that, on virtually all sales, it assumes the credit risk, and that it engages in substantial activities in addition to ticketing airline passengers, mandates a re-evaluation of Judge Getzendanner's finding. This court disagrees.

First, it is worth noting that the relationship at issue here is the one between American and IVI, not the one between American and McTravel. Although Judge Easterbrook appeared to read Judge Getzendanner's ruling as finding a principal/agent relationship between American and McTravel, *see id.*, what the district judge actually found was that "there is a true agent/principal relationship between American and its *travel agents*." *Illinois Corporate Travel, Inc.* v. *American Airlines, Inc.*, 85 C 7079, slip op. at 11 (emphasis added). Indeed, Judge Easterbrook's reading must have been an oversight. Since Count II (unlike Count III) is predicated on the allegedly illegal price-fixing agreement between American and IVI, the relevant inquiry for determining the agreement's legality is whether American and IVI were supplier and reseller or principal and agent. By focusing on its own relationship with American, McTravel missed the boat—or, if you will, the plane.

Yet, even assuming that McTravel's relationship with American is standard for travel agencies, so that the additional evidence it supplied on this score can be used in examining the IVI-American relationship, McTravel cannot escape summary judgement. The fact that travel agencies engage in activities outside of their roles as agents for the airlines has no bearing on their status as agents with respect to the sale of airline tickets. *Ryko Mfg. Co.* v. *Eden Services*, 823 F.2d at 1124. And McTravel's efforts to make capital out of the fact that travel agencies assume the credit risk on credit card sales over the telephone in unavailing. As American points out:

> Airlines do not force travel agents to accept telephone credit card sales. . . . McTravel admits that not obtaining a signature and card imprint on telephone sales is contrary to ARC policies, and that if it follows the proper procedures, it has no credit risk. Any risk that McTravel assumes by accepting *unauthorized* methods of payment is a risk that is peculiar within its control and does not change its status from an agent to a reseller. *Mesirow* v. *Pepperidge Farm, Inc.*, 703 F.2d 339, 343 (9th Cir. 1983).

American's Reply Brief at 26 (citing McTravel's Opposing Mem. at 27 n.9); *see also American Oil* v. *McMullen*, 508 F.2d 1345, 1349 (10th Cir. 1975).

Indeed, McTravel's argument that travel agencies serve as agents of the airlines in issuing tickets appears almost facetious in light of the disclaimer it provides in documents to its customers: "McTravel is only an agent for the airlines, hotels and car rental companies, which means that they pay us to help you buy services from them. Therefore, we are not responsible for the acts of those airlines, hotels and rental companies, and we cannot guarantee that they will do what they promise to do." McTravel wants to be considered an agent of the airlines for some purposes and a reseller of airline tickets for others.

It cannot. As their title indicates, travel agencies are agents. In an effort to avoid the ramifications of this fact, McTravel makes one final thrust. It asserts in a single sentence of its response brief that the fact that American sells some 30% of its tickets directly to travelers vitiates the agency exception to § 1 liability here because "the rule allowing a principal to set the price at which its agent sells has no application when they are horizontal competitors." McTravel's Response Brief at 22-23 (citing *United States* v. *Masonite Corp.*, 316 U.S. 265 (1942); *Sun Oil Company* v. *F.T.C.*, 350 F.2d 624, 633-34 (7th Cir. 1965),

cert. denied, 382 U.S. 982 (1966)).[6] Judge Getzendanner twice rejected this position, finding that although American does act as a travel agency for a substantial portion of its sales, "there is no true competition between the airline and the agent." *Illinois Corporate Travel, Inc.* v. *American Airlines, Inc.*, 85 C 7079, slip op. at 10-11, *on rehearing*, slip op. at 8 (January 8, 1986).

Yet, Judge Getzendanner's finding at the preliminary injunction stage does not mean that there is no genuine factual issue on this score. McTravel has presented testimony of a number of competent witnesses that airlines do compete with travel agencies for sales. If, as McTravel contents, the agency exception does not apply when the principal competes at the same level of distribution as its agents, then McTravel has the right to have a jury resolve the factual dispute.

In *Masonite*, the Supreme Court held that *General Electric* did not protect the holder of a patent on hardboard who had entered into an agreement with its competitors under which the product was shipped to the competitors on consignment, title remained in the patent-holder, and the patent-holder set the prices at which the product was to be sold. McTravel reads this case as establishing that *General Electric*'s agency exception to § 1 does not apply whenever the principal is in competition with its agents.

The problem with this interpretation of *Masonite* is that, in *General Electric*, the principal, a patent holder and

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[6] Despite more than one hundred pages of rambling text, the defendants made no mention of these two cases, relying instead on Judge Getzendanner's factual finding that American does not compete with travel agencies. Footnote 1 above and the discussion below will hopefully clarify for the defendants the inadequacy of their responses.

manufacturer of electric lamps, sold the lamps both directly through its employees and through authorized agents. Thus, if McTravel's interpretation of *Masonite* is correct, then *Masonite* did not merely distinguish *General Electric*; rather, it effectively overruled the earlier case.

In *Sun Oil*, the Seventh Circuit seemed to hold that *Masonite* did just that. *Sun Oil* was an appeal from a Federal Trade Commission finding that Sun had violated § 1 through a consignment arrangement with its dealers similar to the one held illegal in *Simpson*. The FTC, having ruled before the Supreme Court handed down *Simpson*, had determined that *General Electric* did not protect Sun, on the grounds that, because there was both horizontal price fixing among the dealers in addition to vertical price fixing between Sun and each dealer, *Masonite* controlled.

By the time the Seventh Circuit ruled on the appeal, the Supreme Court had issued its ruling in *Simpson*. Thus, the Court of Appeals was easily able to affirm the FTC's ruling on the basis of that opinion. 350 F.2d at 635. Nevertheless, the Court also indicated that *Masonite* alone justified the FTC's determination that *General Electric*'s agency exception did not apply. 350 F.2d 633-35. The Court concluded by noting that the combination of *Masonite* and *Simpson* left *General Electric* narrowly limited to "its special facts." 350 F.2d at 635. "Thus limited, it is now undoubtedly the law that, with regard to unpatented products, no such 'exception' exists." *Id.*

Were *Sun Oil* the last word by the Seventh Circuit on this issue, McTravel would clearly prevail here. But it is not. In *Morrison* v. *Murray Biscuit Co.*, 797 F.2d 1430 (7th Cir. 1986), the Court unequivocally revitalized *General Electric*'s agency exception for ordinary manufacturers as

well as patent holders. In so doing, it read *Simpson* and *Masonite* as narrow holdings prohibiting manufacturers from merely labelling dealers and competitors as agents in order "to circumvent the rule against price fixing." 797 F.2d at 1436.

Judge Easterbrooks' principal-agent analysis in ruling on McTravel's appeal confirms that *Morrison* applies to this case, so that unless McTravel can establish a genuine issue of fact as to whether IVI was a "true agent" of American, defendants are entitled to summary judgment here.[7] As discussed above, it cannot. Accordingly, the agreement between American and IVI regarding the advertising of discounts is legal under § 1 of the Sherman Act, and the defendants are entitled to summary judgment on Count II.

Count I, like Count II, attacks the relationship between American and IVI and American's response to IVI's complaint, but it does so with a slightly different focus. Count I alleges as the illegal concerted action not the contract between American and IVI, but an alleged conspiracy between them, initiated by IVI, to deprive McTravel of the

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[7] McTravel makes much of Judge Easterbrook's suggestion that price fixing agreements between principals and agents may be subject to the rule of reason. Yet, as Judge Easterbrook noted, and defendants emphasize, every case that has found a true agency relationship has upheld the price fixing agreement without further analysis. *Illinois Corporate Travel, Inc.* v. *American Airlines, Inc.*, 806 F.2d at 729. So long as the agency relationship is a bona fide one, a price fixing agreement between a principal and an agent is lawful. The Supreme Court's condemnation of the agreements in *Masonite*, though appearing at first blush to be the result of an extensive rule of reason analysis, is better viewed as reflecting the Court's conclusion that the patentee was using the agency label as a subterfuge "to enlarge that monopoly of the patent." *Mercoid Corp.* v. *Mid-Continent Co.*, 320 U.S. 661, 666 (1944); *Morrison* v. *Murray Biscuit Co.*, 797 F.2d at 1437.

ability to compete with IVI by prohibiting McTravel from selling discounted American tickets.

This court is aware of no case which has expressly held that a principal and an agent, though protected from § 1 liability for a contract in restraint of trade, can nonetheless be held liable for a conspiracy in restraint of trade when the alleged conspiracy arises out of the lawful contract. Yet, neither IVI nor American have raised this defense to Count I, and the Seventh Circuit appears to have accepted the validity of McTravel's claim if McTravel can show that "American conspired with other travel agencies to cut off competition from an upstart with a novel way of doing business." *Illinois Corporate Travel, Inc.* v. *American Airlines, Inc.*, 806 F.2d at 726. In other words, although American and IVI cannot be held liable solely for their agreement on the advertising of discounts, they could be held liable if this agreement flowed, not from American's unilateral determination of an appropriate advertising policy, but instead from a conspiracy initiated by IVI to thwart its discounting competitors.

American presented two defenses to this claim in its argument before Judge Getzendanner. "First, it argue[d] under the intra-enterprise conspiracy doctrine that as a matter of law a principal cannot conspire with its agent. Next, American argue[d] that there is insufficient evidence of such conspiracy to justify the issuance of a primary injunction." *Illinois Corporate Travel, Inc.* v. *American Airlines, Inc.*, 85 C 7079, slip op. at 11.

Judge Getzendanner ruled that the intra-enterprise conspiracy doctrine, most recently discussed by the Supreme Court in *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752 (1984) (a corporate parent cannot conspire with its wholly owned subsidiary), does not apply with

respect to the principal-agent relationship at issue in this case because "American and each of its travel agents [are not] a single economic entity with a complete unity of purpose." *Illinois Corporate Travel, Inc.* v. *American Airlines, Inc.*, 85 C 7079, slip op. at 11 (citing *Albrecht* v. *Herald Co.*, 330 U.S. 145 (1968)). The Seventh Circuit agreed, *Illinois Corporate Travel, Inc.* v. *American Airlines, Inc.*, 806 F.2d at 726, and American has not pursued this argument here.

American does challenge, however, McTravel's contention that the evidence creates a genuine issue of fact as to whether American acted against McTravel because of an illegal conspiracy with IVI. An immediate problem with American's argument and McTravel's response is that they ignore the distinction between Count I and Count II, and thus misapply cases with fact patterns closer to the latter.

Monsanto Co. v. *SprayRite Services Corp.*, 465 U.S. 752 (1984), *United States* v. *Parke, Davis & Co.*, 362 U.S. 29 (1960), and other cases dealing with the evidentiary burden required to get to the jury on an allegation of concerted action in a § 1 case did not involve principal-agency relationships. The sole issue in those cases was the nature of the evidence needed to establish an agreement between the manufacturer and the distributor. In this case, by contrast, there is no question that American and IVI had an agreement on advertising, and that there is sufficient evidence for a jury to find that American's action against McTravel was causally related to this agreement. This genuine factual issue does not help McTravel, however, because the principal-agent relationship between American and IVI makes this agreement legal. Instead, to get to the jury on Count I, Mctravel must establish a genuine issue of fact as to whether this agreement came about

as a result of IVI's efforts to keep McTravel from successfully competing as a discount travel agency.

McTravel contends that the factual dispute over the timing of American's decision to implement its no-advertising policy suffices. Since the jury could find that the policy arose only after IVI (and other travel agencies) complained to American, McTravel insists that jury also could find that American was serving as IVI's "cat's paw." *Illinois Corporate Travel, Inc.* v. *American Airlines, Inc.*, 806 F.2d at 726.

In *Monsanto*, the Supreme Court ruled that, to get to a jury on a § 1 claim, "there must be evidence that tends to exclude the possibility of independent action by the manufacturer and the distributor. That is, there must be direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co.* v. *SprayRite Services Corp.*, 465 U.S. at 768. Complaints from the plaintiff's competitors, followed by action on the part of the manufacturer are insufficient to meet this burden: "Permitting an agreement to be inferred from the existence of complaints, or even from the fact that termination came about 'in response to' complaints could deter or penalize perfectly legitimate conduct." *Id.* at 763.

Matsushita Electric Industrial Co. v. *Zenith Radio Corp.*, 106 S.Ct. 1348 (1986), went one step further. "[I]f the factual context renders [plaintiff's] claim implausible—if the claim is one that simply makes no economic sense—[plaintiff] must come forward with more persuasive evidence to support [its] claim than would otherwise be necessary." *Id.* at 1356.

It is clear that American took action against McTravel in response to IVI's complaint. Even under *Monsanto*

alone, however, this dispute does not suffice to establish a genuine issue as to the existence of an unlawful conspiracy between IVI and American. *Illinois Corporate Travel, Inc.* v. *American Airlines, Inc.*, 806 F.2d at 726 ("Evidence that American discussed both price and McTravel with other agents does not support an inference of conspiracy.").

Matsushita enlarges this deficiency. Since it was lawful for American to enter into the no-advertising agreement with IVI, McTravel must show not only that an agreement existed, but that the agreement was sparked by IVI. To demonstrate that this was this case, McTravel argues that the policy was contrary to American's pecuniary interests: Since American receives the same amount from its agents irrespective of the price they charge their customers, the sale of discounted tickets, which can only result in additional sales, increased American's revenue. Yet this very argument brings *Matsushita*'s added evidentiary burden into play. McTravel has presented nothing to satisfy this burden. The defendants are entitled to summary judgment on Count I.

CONCLUSION

The defendants are entitled to summary judgment on the three remaining counts in the complaint. Judgment is entered for the defendants.

ENTER:

BRIAN BARNETT DUFF, JUDGE
UNITED STATES DISTRICT COURT

DATE: November 18, 1988

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ILLINOIS CORPORATE TRAVEL, INC., d/b/a McTravel Travel Services,	)	
Plaintiff,	)	
v.	)	No. 85 C 7079
AMERICAN AIRLINES, INC., IVI TRAVEL INC., and TRAVEL RITE, INC.,	)	
Defendants.	)	

MEMORANDUM OPINION

In well-written and undoubtedly heartfelt memoranda, McTravel has moved for reconsideration of this court's November 18, 1988 order granting summary judgment for American and IVI. Because that order sufficiently addressed most of the arguments in McTravel's current motion, this court will deal with McTravel's renewed arguments in summary fashion.

The complaint contained three counts: Count I alleged a concerted refusal to deal; Count II alleged horizontal resale price maintenance; Count III alleged vertical resale

price maintenance. Although the court addressed them in reverse order in the initial decision, the court will tackle them sequentially here.

With regard to Count I, the court held that to prove a concerted refusal to deal, McTravel had to show that its termination flowed from IVI's efforts to wipe out its discounting competitor. The fact that there was a *contract* on resale price maintenance was not enough because *that* agreement was lawful per the agency exception. McTravel's argument—that the court found an agreement between American and IVI so nothing more need be shown to get to the jury—ignores that ruling. The "agreement" it says this court found in the decision was an agreement on *prices*, not an agreement to terminate McTravel, and thus was insufficient to establish unlawful concerted action.

Indeed, McTravel's reference to the Supreme Court's ruling in *Monsanto* that, once a price-fixing agreement is established, the court can infer that any subsequent refusal to deal by the manufacturer resulted from this agreement, only proves the point. For if that inference held even in cases of price-fixing agreements between principals and their agents, then the agency exception to § 1 would be meaningless. It is not.

As for Count II, McTravel contends that this court erred in interpreting *Masonite*, the Supreme Court ruling that followed *General Electric* and that *Sun Oil* interpreted as effectively nullifying *General Electric*'s agency exception. McTravel asserts that *Masonite* stands for the proposition that where the manufacturer and the distributor compete at the distribution level, the agency exception does not apply. Thus, since there is a genuine factual issue as to whether American competed with travel agencies, McTravel contends that the agency exception does not apply here.

Yet, as this court pointed out in its decision, *General Electric* also involved horizontal competition between the manufacturer and the distributor, so if *Masonite* stands for what McTravel says it does, "then *Masonite* did not merely distinguish *General Electric*; rather, it effectively overruled the earlier case." The question thus becomes whether to read *Masonite*, or instead *General Electric*, narrowly. *Sun Oil* (the Seventh Circuit's 1966 case), suggested that *General Electric* was the narrow ruling, and that *Masonite* was the broad one—effectively vitiating the agency exception. But *Morrison* and *Illinois Corporate Travel*, two Seventh Circuit cases within the past three years, have (implicitly) rejected *Sun Oil* and have stated unequivocally that *General Electric*'s broad agency exception applies. Since, as noted above, *General Electric* also involved horizontal competition between the manufacturer and its distributors, McTravel's argument that the (alleged) competition between American and its travel agents takes this case outside the agency exception in incorrect.*

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* In its reply memorandum, McTravel concedes that its argument is not that this court has misread *Morrison* and *Illinois Corporate Travel*, but is instead that the Seventh Circuit has misread *General Electric* and *Masonite*. According to McTravel, a court of appeals has no authority to refuse to follow a Supreme Court ruling, and when it does so, the district court must ignore the circuit court opinion and follow the Supreme Court. *But see Indianapolis Airport* v. *American Airlines, Inc.*, 733 F.2d 1261 (7th Cir. 1984).

Fortunately, this court need not decide whether McTravel is correct on this point. Although *Morrison* and *Illinois Corporate Travel* overruled *Sun Oil*'s reading of *General Electric* and *Masonite*, they did not overrule either of the two Supreme Court opinions. *General Electric* and *Masonite* involved similar fact patterns but came out differently, and it was up to the circuit courts

(Footnote continued on following page)

Finally, with respect to Count III, this court held that there was no agreement between McTravel and American on prices, so McTravel could not state a claim for *concerted* resale price maintenance between McTravel and American. McTravel insists, however, that because it was approved by the ARC, and because American filed a general concurrence to the ARC, McTravel and American did have an agreement on advertising. Yet, McTravel did not gain the recognition of the ARC until March, whereas the fracas between American and McTravel occurred in January. Thus, it is erroneous to suggest that McTravel and American ever agreed on the advertising policy. Moreover, even if they did, the agency exception would still bar McTravel's claim.

McTravel concludes by arguing that this court erred in finding a true agency relationship between American and its travel agents, listing six factual issues on which it says the court misread the record. Yet, when McTravel asserts in its reply memorandum that the agency relationship between American and travel agencies "serves no function other than to circumvent the rule against price-fixing," it essentially concedes what this court has already found: There is an agency relationship between American and travel agencies. To be sure, McTravel insists that this agency relationship is not a bona fide one, but that argument has absolutely no support anywhere in McTravel's evidence; indeed, McTravel does not even hint at another way by which American could efficiently and effectively

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* *continued*
to determine which was the broad holding and which was the narrow one. *Sun Oil* came out one way; *Morrison* and *Illinois Corporate Travel* came out another. But none of the three overruled either of the two, and therefore this court has no choice but to abide by the Seventh Circuit's more recent approach.

sell its tickets to customers. In any case, this court remains convinced that its analysis of the relationship between airlines and travel agents was correct and that accordingly, as a matter of law, American and its travel agencies have a true agency relationship.

McTravel's motion to reconsider must therefore be denied.

ENTER:

BRIAN BARNETT DUFF, JUDGE
UNITED STATES DISTRICT COURT

DATE: January 12, 1989

APPENDIX D

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 86-1201

ILLINOIS CORPORATE TRAVEL, INC.,
d/b/a MCTRAVEL TRAVEL SERVICES,

Plaintiff-Appellant,

v.

AMERICAN AIRLINES, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 85 C 07079—Susan Getzendanner, *Judge.*

ARGUED SEPTEMBER 16, 1986—DECIDED NOVEMBER 19, 1986

Before BAUER, *Chief Judge,* and FLAUM and EASTERBROOK, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* American Airlines does not allow McTravel Travel Services to write tickets good for travel on American, because McTravel will not agree by contract not to advertise discounts. McTravel wants to let people know that it will rebate part of a travel agent's usual 10% commission. American's policy is functionally a price restriction. See *United States v. Gasoline Retailers Ass'n,* 285 F.2d 688 (7th Cir. 1961); cf. *Catalano, Inc. v. Target Sales, Inc.,* 446 U.S. 643, 649 (1980). This led to McTravel's claim that American has violated the *per se* prohibition against resale price maintenance

established by *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 404-09 (1911), and reaffirmed in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 102-03 (1980). See also *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761 n.7 (1984).

The district court declined to issue a preliminary injunction, however, concluding that plaintiff McTravel and other "travel service companies" are genuine agents. Ever since *United States v. General Electric Co.*, 272 U.S. 476 (1926), the agency relation has been outside the *per se* rule of *Dr. Miles*. The district court thought that *General Electric* doomed most of McTravel's antitrust arguments as a matter of law. The only possible exception, according to the district court, would arise if there had been "concerted action between American and some of its agents to put McTravel out of business." After reviewing evidence on this score, the district judge concluded that there was no direct support for a conspiracy; as for the inference of a conspiracy, the district court wrote: "The conspiracy evidence (on the present record) is weak." The court then concluded that McTravel would not suffer sufficient irreparable harm pending a trial on the merits to justify an injunction in the face of its "weak" case on the merits.

Because a district court has substantial discretion to evaluate the "equity" factors in passing on motions for preliminary injunctions, see *Lawson Products, Inc. v. Avnet, Inc.*, 782 F.2d 1429 (7th Cir. 1986); *American Hospital Supply Corp. v. Hospital Products Ltd.*, 780 F.2d 589 (7th Cir. 1986); McTravel has devoted most of its effort on appeal to an argument that the district court incorrectly assessed its probability of success on the merits. It seeks to bring the case within a rule of *per se* illegality. American does not deny that it has refused to allow McTravel to write tickets if it also advertises discounts. If this admitted policy is illegal *per se*, then the district judge surely abused her discretion in denying McTravel's request for preliminary relief. We therefore take up the

argument that American's policy is unlawful *per se*. McTravel pursues its claim in three ways: arguing that *Dr. Miles* applies, that there was a conspiracy to evict McTravel from the market, and that American's program so obviously injures consumers that it should be deemed illegal *per se* even if *Dr. Miles* does not apply directly.

McTravel's principal argument is that *General Electric* died an unnatural death at the hands of *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964). Before the case was argued, however, we concluded in *Morrison v. Murray Biscuit Co.*, 797 F.2d 1430 (7th Cir. 1986), that *General Electric* is healthy. Employment relations do not violate the antitrust laws; Sears may tell the managers of its stores at what price to sell lawn mowers. *Morrison* held that genuine agency relations should be treated like employment relations. The owner of a house may tell the real estate agent the minimum price the owner will accept without committing a *per se* offense. What *Simpson* held, we concluded, is that a manufacturer may not avoid *Dr. Miles* by giving the name "agent" to one who serves the same economic functions as an ordinary wholesaler or retailer. The appropriate inquiry, according to *Morrison*, is "whether the agency relationship has a function other than to circumvent the rule against price fixing." 797 F.2d at 1436.

Counsel for McTravel conceded at oral argument that if this language in *Morrison* establishes the legal test, then it loses on its *per se* argument. The concession was well advised, because the district judge's thorough findings demonstrate that the relation is a genuine agency. Travel service operators do not resell air travel. We set out some of the district court's findings.

An air carrier establishes and announces to the public a price for its service. The airline determines the number and destination of flights and the equipment to be used on each. A traveler may reserve seats directly from the airline or through a travel agent; in either case the reservation is likely to be made on a computer that records the number of seats remaining on a flight and the price

of each. The travel agent must obtain the airline's clearance (by computer) to book a flight. The agent does not purchase a seat for resale and does not hold an inventory of seats. (Some seats are purchased for resale, usually on charter flights but increasingly on other flights. We do not deal with seats purchased outright by travel service operators.) The airline or any agent in the country can sell the same seat. It remains available until reserved—and sometimes even after, for air carriers "overbook" to deal with no-shows. The traveler with a ticket goes to the airport and is served directly by the airline. If the traveler does not show up, the seat may fly empty and the airline loses the sale. (Some tickets have cancellation charges, a detail that does not affect the analysis.) The travel service operator takes no risk of unfilled seats or of the many problems, from mechanical difficulties to weather, that may make the airline unable to deliver transportation as promised. The airline takes all credit risks on the credit cards it accepts. True, as McTravel argues, the travel agent loses its commission when the traveler does not show and has his ticket refunded, but this is true of any agent when a sale falls through. The relation of travel agent to airline is not substantially different from the relation of broker to real estate owner, of brokerage house to investor, or of travel agent to hotel, rental car company, or other provider of travel services.

The district court concluded from these facts that travel service operators are genuine agents within the meaning of *General Electric*. This conclusion is amply supported by the record. McTravel therefore sought at oral argument to persuade us to alter the standard articulated in *Morrison*. It contended that the standard makes liability turn on the intent of the parties adopting the arrangement. Counsel accurately observed that this court has been skeptical about "intent" tests in antitrust law. E.g., *Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*, 797 F.2d 370, 379-80 (7th Cir. 1986); *Ball Memorial Hospital, Inc. v. Mutual Hospital Insurance, Inc.*, 784 F.2d 1325, 1338-39 (7th Cir. 1986). See also VII

P. Areeda, *Antitrust Law* ¶1506 (1986). Intent is a slippery issue, because firms may "intend" to harm rivals or acquire monopolies even though their practices, objectively viewed, are beneficial to consumers, "whose interests the [Sherman Act] was especially intended to serve". *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 15 (1984). We do not believe, however, that the standard in *Morrison* requires reference to the mental states of the parties. "[T]he agency relationship has a function other than to circumvent the rule against price fixing" (797 F.2d at 1436) when, objectively viewed, the arrangement serves one of the economic functions of agencies in general, such as apportioning risk to the firm best able to bear risk, or lodging pricing decisions in the firm best able to gauge market conditions. In *Morrison* itself the court found that a food broker is an agent because the principal is in the best position to evaluate market conditions and decide on an optimal selling strategy, 797 F.2d at 1437-38, not because of subjective intent. The same objective approach here supports the district judge's conclusion that McTravel is an agent of airlines and not a reseller. This means that the *per se* rule of *Dr. Miles* does not apply. (Of course, conclusions that depend on the record compiled so far might be altered if additional facts adduced at trial show that the district court has mischaracterized the nature of the relation between airlines and travel service operators. Here and elsewhere, we speak only of the conclusions drawn on the basis of the existing record.)

McTravel's second argument in support of *per se* treatment is based on horizontal collusion among dealers, usually a firm footing for *per se* analysis. McTravel contends that American conspired with other travel agents to cut off competition from an upstart with a novel way of doing business. (McTravel does not allege that there is a conspiracy among airlines.) We agree with the district court that American and its agents are not the same firm for purposes of *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). Collaboration among dealers

orchestrated through American therefore might establish a *per se* violation. The record does not contain an explicit agreement, however; it must be inferred, if it can be shown at all; the district court thought the evidence in support of such an inference "weak", and this is an appropriate characterization.

The Supreme Court held in *Monsanto* and reiterated in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 106 S. Ct. 1348, 1356-57 (1986), that to show conspiracy indirectly the plaintiff must demonstrate that the firm is behaving in a way that is inconsistent with unilateral decisionmaking. See also, e.g., *Garment District, Inc. v. Belk Stores Services, Inc.*, 799 F.2d 905, 908-11 (4th Cir. 1986); *Souza v. Estate of Bishop*, 799 F.2d 1327, 1329-30 (9th Cir. 1986). This means showing that the defendant acted in a way that, but for a hypothesis of joint action, would not be in its own interest. See also *Morrison*, 797 F.2d at 1439-40; *Westman Commission Co. v. Hobart International, Inc.*, 796 F.2d 1216, 1222-25 (10th Cir. 1986); *Business Electronics Corp. v. Sharp Electronics Corp.*, 780 F.2d 1212, 1217-18 (5th Cir. 1986); Liebeler, *Intrabrand "Cartels" Under* GTE Sylvania, 30 U.C.L.A. L. Rev. 1 (1982). If the evidence is consistent with the hypothesis that the firm at the top of the vertical chain designed the restrictions for its own purposes, an inference of conspiracy is inappropriate.

In any chain of distribution discussions of price will be frequent—and as *Monsanto* pointed out, beneficial too. 465 U.S. at 762-64. Concerns about free-riding by discount travel agents, which we discuss below, may have led American to adopt its policy no matter what the agents thought or wanted. Consequently, it cannot be thought "clearly erroneous" for the district court to conclude that McTravel is unlikely to establish conspiracy here. Evidence that American discussed both price and McTravel with other agents does not support an inference of conspiracy. The usual "conspiracy" argument in a vertical restraints case is that the manufacturer is a cat's paw of "full price" retailers trying to maintain their prices.

In this case, by contrast, McTravel complains that American has snubbed it in order to please other big discounters among its agents. There is no plausible anti-consumer reason why American would promote some discounters over another. The district court was entitled to think McTravel unlikely to prevail, at least on the record developed so far.

Much of McTravel's remaining argument asks us to put aside formal labels and turn directly to what McTravel believes is the adverse effect of American's rule on consumers. This is the sort of short form or quick look Rule of Reason analysis endorsed in *NCAA v. Board of Regents*, 468 U.S. 85, 109-10 & n.42 (1984). See also VII Areeda at ¶1508. McTravel argues that American's demand that travel agents not advertise price reductions injures consumers by forcing them to pay higher prices. Because the antitrust laws are designed to assist consumers, see *Olympia Equipment*, 797 F.2d at 375 (collecting cases), *Westman Commission*, 796 F.2d at 1220, McTravel concludes that American's efforts to squelch the discounting should be forbidden.

This is a short-run view, however. Any form of vertical restraint affects prices, as the Supreme Court emphasized in *Monsanto*. The question is not whether the arrangement affects moment-to-moment rivalry in a way that raises today's prices, but whether this effect is associated with potential benefits to consumers that are worth the price. Higher quality may come with higher prices. The antitrust laws do not adopt a model of atomistic competition that condemns all organization; otherwise they would forbid Sears to tell the managers of its stores what prices to charge. Organization may be beneficial; there is little production in a world without organization. The question is how much organization is optimal from consumers' perspective, see *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986), and fixation on the short run effects on price is unlikely to yield a useful answer to such a complex question.

Both American Airlines and travel agents sell tickets for American's flights. American apparently wants all agents to charge the same price it does. A few years ago it abandoned efforts to enforce this rule, because agents were giving disguised discounts. They could, for example, sell a package of air travel and hotel space at a bargain, claiming that they had collected the full commission on the air travel but rebated the commission on the hotel room. (This illustrates how tie-in sales can be used to give secret discounts. See *Robert's Waikiki U-Drive, Inc. v. Budget Rent-A-Car Systems, Inc.*, 491 F. Supp. 1199 (D. Hawaii 1980), aff'd, 732 F.2d 1403 (9th Cir. 1984).) American then adopted its no-advertising rule, which is easily enforceable because advertising of discounts is observable. McTravel ran afoul of American's policy by advertising a fixed price for its services. It collects $8 for making a reservation and $7 for issuing a ticket, a total of $15 if the traveler uses both services. McTravel rebates to customers the difference between its price and the usual 10% commission. This will be attractive when the ticket's price exceeds $150.

The discount pricing structure supports McTravel's argument that it is doing a favor for consumers. But the question of characterization—whether for purposes of *per se* analysis or under the "quick look" version of the Rule of Reason—is not whether the plaintiff is a discounter. It is whether the practice at issue "facially appears to be one that would always or almost always tend to restrict competition and decrease output, and in what portion of the market, or instead one designed to 'increase economic efficiency and render markets more, rather than less, competitive.' " *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1, 19-20 (1979), quoting from *United States v. United States Gypsum Co.*, 438 U.S. 422, 441 n.16 (1978). Unless the practice "almost always" makes consumers worse off, it is not subject to condemnation without more detailed study of its effects—including proof of market power and actual injury. See *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977); *Assam Drug Co. v. Miller Brewing Co.*, 798 F.2d 311, 314-17 (8th Cir. 1986).

GTE Sylvania observed that arrangements among firms in a vertical chain of supply often may be beneficial to consumers. 433 U.S. at 51-57. *Monsanto* also observed that price and non-price arrangements alike may produce these benefits. 465 U.S. at 762. Non-price arrangements, such as exclusive territories, may lead to higher prices; price arrangements, such as setting an agent's price, may induce agents to supply extra services that consumers desire. Non-price arrangements now are judged under the Rule of Reason. If there is no inevitable difference between price and non-price rules—if there is not, indeed, even a bright line separating the two, as this case shows in treating an advertising rule as a price rule, and see, e.g., *Jack Walters & Sons Corp. v. Morton Building, Inc.*, 737 F.2d 698, 706-07 (7th Cir.), *cert. denied*, 469 U.S. 1018 (1984); *Eastern Scientific Co. v. Wild Heerbrugg Instruments, Inc.*, 572 F.2d 883, 885-86 (1st Cir.), *cert. denied*, 439 U.S. 833 (1978); Liebeler, *1983 Economic Review of Antitrust Developments: The Distinction Between Price and Nonprice Distribution Restrictions*, 31 U.C.L.A. L. Rev. 384 (1983)—then there is no good argument for expanding either the *per se* rule or a summary version of the Rule of Reason to additional forms of vertical arrangement, as McTravel wishes us to do. *Dr. Miles* is not the model for the classification of new business arrangements.

American's prohibition of McTravel's price advertising does not call for summary condemnation at the preliminary injunction stage of this litigation. It does not "always or almost always" work to consumers' detriment. American has no particular reason to cram unwanted money down the throats of travel agents. If travel agents are charging too much for their services, why does American not reduce the commission and thereby angle for passengers with lower net prices at no cost to itself? It must be purchasing some sort of valuable service from these travel agents. Many thoughtful people believe that vertical restraints are as a rule beneficial to consumers and ought not be condemned lightly or ever. E.g., Bork, *Ver-*

tical Restraints: Schwinn *Overruled*, 1977 Sup. Ct. Rev. 171; Butler & Baysinger, *Vertical Restraints of Trade as Contractual Integration*, 32 Emory L.J. 1009 (1983); Hay, *Vertical Restraints After* Monsanto, 66 Cornell L. Rev. 418 (1985); Liebeler, *1983 Economic Review*, *supra*; Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. Chi. L. Rev. 6 (1981); Telser, *Why Should Manufacturers Want Fair Trade?*, 3 J.L. & Econ. 86 (1960). The Supreme Court was receptive to such thoughts in *GTE Sylvania*, *Monsanto*, and *Rice v. Norman Williams Co.*, 458 U.S. 654 (1982). When a new vertical restraint comes before a court, then, the appropriate response is not automatic condemnation but consideration whether the practice has a potential for harm (which includes an inquiry into market power) and, if there is such a potential, whether there are also potential benefits for consumers. See *Rothery Storage* and *Westman Commission*, among the many recent cases in other circuits adopting this approach. See also *Business Electronics*, 780 F.2d at 1221-22 (Jones, J., concurring).

American has raised some potential benefits of its practices. It has expressed concern about free riding by discount agents on the work of other agents or American itself. See *GTE Sylvania*, 433 U.S. at 53-57, and *Monsanto*, 465 U.S. at 762-63. Some agents may offer thorough counselling to travelers, and American offers an information and reservations service by phone and at offices in large cities. Travelers might frequent these full-service agencies, make reservations, and then pick up their tickets at McTravel for 90% of the price plus $7. The siphoning of business would prevent full-service agents, and American itself, from recovering the costs of what may be an expensive process of giving advice and making the reservation. (McTravel itself believes that the cost to make a reservation is $8, and agencies that do more may incur higher costs.) If McTravel cannot draw attention to its unbundled prices—or if all agents charge the same price—then agents may compete for business by offering better service. Customers who use American's (or a given agent's)

reservation service have no incentive to go elsewhere to pick up their tickets; American and its agents therefore are compensated for their services and will provide the level of service that travelers prefer. See *Westman Commission*, 796 F.2d at 1226-27.

This explanation shows that American's rule may be beneficial to customers. That is enough to establish that summary denunciation is inappropriate. If we were to bring this agency relation within the scope of a bobtailed *per se* rule, the effect would be the same as if *Simpson* had indeed overruled *General Electric*. Courts have long believed that once a relationship is a *genuine* agency, the manufacturer or supplier has the same uninhibited power to set the agent's price that he has to set the price to be charged by an employee. An appeal from the denial of a preliminary injunction is not the time to upset this long-held position.

We emphasize once more the narrow scope of our review. The district court has not found that American's practices are beneficial to consumers or are lawful; neither do we. There has not been a trial, and the district judge has not made findings on the subject. It is not appropriate to foreclose an argument that American could have made less restrictive arrangements. It might, for example, unbundle its prices. American could reduce to (say) $7 the commission it pays to an agent that does nothing but issue a ticket against a reservation made by someone else. On the other hand, this might complicate the reservations system, requiring separate computer entries for the reserving agent and the issuing agent. Whether unbundling is cost-justified ordinarily is a matter to be determined by competition in the market, not by judges.

We do not imply that defendants must justify their conduct; to the contrary, plaintiffs in antitrust, as in other parts of the law, bear an initial burden of showing that the conduct in question is probably harmful. Only then need the defendant supply a justification. *Rothery Storage*, 792 F.2d at 229 n.11. When the arrangement in question is a traditional one such as employment or agency, that

burden is particularly steep. Perhaps price arrangements in agency relations are best deemed lawful *per se*, as employment arrangements are and as courts have assumed to date is the inevitable effect of a finding of agency. We need not pursue the possibility. Our point is that so far McTravel has not reached first base. The district court was therefore entitled to find that McTravel's chances of success on the merits are slight.

This conclusion means that we can follow the district court's example and discuss irreparable injury only briefly. American's market share of air transportation is less than 15%. United, which carries 16% of the nation's air traffic, does not prohibit advertising of discounts. So far as the record shows, most of the industry follows United rather than American. Texas Air (Continental, Eastern, New York Air), which just became the largest carrier at 17%, is an aggressive price cutter. Agents and customers therefore are not at American's mercy—or so the district judge was entitled to conclude. Although McTravel argues that American's share of traffic at Chicago exceeds 20% and that an agent must be able to write tickets for all carriers to be successful, which magnifies American's market power and the irreparable injury, the record does not show how McTravel has done without being able to write for American. Perhaps its unusual method of setting prices will attract business and overcome the disadvantage of limited agency. The district judge thought this a possibility, and we defer to her judgment in assessing such matters at the preliminary injunction stage. See *Lawson Products*, 782 F.2d at 1433-34; *American Hospital*, 780 F.2d at 593-94; see also *Ball Memorial Hospital*, 784 F.2d at 1333-34. It is enough for now that we concur in the district court's conclusion that McTravel is unlikely to prevail on the merits. That supports the denial of a preliminary injunction. Whether American has market power and whether the anti-ad rule harms consumers by restricting output are questions for the district court in any further proceedings that may be appropriate under the Rule of Reason.

AFFIRMED

FLAUM, *Circuit Judge, concurring in the judgment.* The role of a circuit court reviewing the denial of a preliminary injunction is limited. The reviewing court is to determine whether or not the court below abused its discretion in declining to issue the injunction. *See Lawson Products v. Avnet*, 782 F.2d 1429, 1438 (7th Cir. 1986); *American Hospital Supply v. Hospital Products*, 780 F.2d 589, 594 (7th Cir. 1985). While the majority notes the limits that should constrain its review, I am compelled to conclude that its opinion goes beyond the limits with which it seeks to comply. I also write separately because the majority advances views, which we are not called upon to offer, that appear to conflict with current decisions of the Supreme Court. Therefore, I respectfully cannot join in its opinion.

The majority focuses on the merits of McTravel's claim. That emphasis, I believe, is not required. In reviewing a denial of a preliminary injunction, this court must make three determinations. First, we must determine whether the district court employed the correct preliminary injunction standard. Second, we must review whether in deciding the "threshold" questions—the adequacy of the movant's remedy at law, the danger of irreparable harm, and the existence of some likelihood that the movant will succeed on the merits—the trial court made correct legal determinations and factual findings that were not clearly erroneous. Finally, we must consider whether the district court abused its broad, equitable discretion in its weighing and balancing of the relevant factors. *See Lawson*, 782 F.2d at 1433, 1436-39.

The district court found that McTravel had met its threshold burden of demonstrating that it had some possibility of succeeding on the merits. *Illinois Corporate Travel v. American Airlines*, No. 85 C 07079, slip op. at 19 (N.D. Ill. Sept. 16, 1985) (Memorandum and Order). This was easily done. All McTravel needed to do was to prove that its " 'chances [were] better than negligible,' " *Roland Machinery v. Dresser Industries*, 749 F.2d 380, 387 (1984) (citation omitted). Notwithstanding its finding

that McTravel had met its threshold burden, the district court declined to issue the preliminary injunction. This was because the court found that McTravel had not demonstrated that irreparable harm would result without the injunction, *Illinois Corporate Travel*, slip op. at 22, and because the court concluded that the balance of the equities weighed in American's favor, *id.* at 19-21.

Had the district court declined to issue the injunction because it believed that McTravel had shown *no* possibility of success on the merits, the majority's detailed assessment of the merits might be appropriate. However, because the court found for the plaintiff on the issue of possible success, our review should focus on the issues that made a difference—the court's evaluation of irreparable harm and its balancing of the equities.

The majority uses the correct approach in assessing the district court's finding of no irreparable harm. *See supra* at 12. That finding, standing alone, is enough to uphold the decision of the court below. *See Lawson*, 782 F.2d at 1443.

I do not agree with the majority's approach to reviewing the balance of the equities. The majority states that if American's policy "is illegal per se, then the district judge surely abused her discretion in denying McTravel's request for preliminary relief." *Supra* at 2. The majority uses this observation as a vehicle for its detailed consideration of the strength of McTravel's claims. We have made clear previously that "the ultimate evaluation and balancing of the equitable factors is a highly discretionary decision and one to which this court must give substantial deference." *Lawson*, 782 F.2d at 1437. Consequently, our review of a trial court's use of its equitable discretion will normally not provide justification for this court to review the entire spectrum of contested issues raised by a plaintiff's complaint.

We will have ample opportunity to review the factual and legal issues in this case if it comes to us on appeal following a final order. At that point we will have the

benefit of a complete record and the full input of opposing counsel. *See Thornburgh v. American College of Obstetricians*, 106 S.Ct. 2169, 2176-77 (1986) ("[A] court of appeals ordinarily will limit its review [of the denial of a preliminary injunction] to abuse of discretion" except where the legal issues are "clear" and "the facts are established or of no controlling relevance.").

In light of the above, it would be inappropriate for me to engage in a protracted discussion of the merits of the plaintiff's claims. However, I must express reservation about the majority's suggestion, although only *dicta*, that the alleged vertical price restraint at issue here is to be evaluated under a Rule of Reason standard. This issue, it should be noted, was not discussed by the parties in their briefs or at oral argument. The Supreme Court has recently reconsidered, and refused to abandon, its position that resale price maintenance should be judged under a *per se* standard. *See Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761 n.7 (1984); *Continental T.V. v. GTE Sylvania*, 433 U.S. 36, 51 n.18 (1977). The Court may alter its view in the future. However, until it does, we are not free to depart from long-standing precedent.

Turning, briefly, to the issues actually before us on this appeal, it is not entirely clear from the record produced below that the district court applied the appropriate preliminary injunction standard.[1] Nonetheless, I conclude

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[1] The district court may have interpreted our cases to require that it reach its decision solely by determining whether McTravel's probability of success balanced against the harm it would suffer if the court denied the injunction exceeded American's probability of success balanced against the harm that it would suffer were the injunction granted. While a district court has discretion to consider these factors as part of its effort to weigh the equities, it is not required to do so. This circuit continues to adhere to the traditional equitable doctrines governing preliminary injunctions. We have not adopted "a new legal standard . . . intended . . . to force analysis into a quantative straight jacket," *American Hospital Supply*, 780 F.2d at 593.

that, as a matter of law, the district court was correct in concluding that the plaintiff had some possibility of succeeding on the merits and that it did not abuse its broad discretion in its balancing of the equities between the parties. For that reason, I concur in the judgment of the court.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit